

DWN027 v REPUBLIC OF NAURU (M145/2017)

Court appealed from: Supreme Court of Nauru [2017] NRSC 77

Date of judgment: 22 September 2017

The appellant was born in Khyber Pakhtunkhwa Province, Pakistan. He owned a grocery store. On 20 May 2013, four members of the Taliban entered his store and demanded that he join them or pay money. He refused. On 24 May 2013, a proprietor in the vicinity of the appellant's store was killed after ignoring a similar demand. On 30 May 2013, the appellant was chased from his store by the four men who had made the earlier demand, now wielding guns. The appellant was able to escape and lock up his shop and did not return. On 3 June 2013, the appellant went out to purchase medication for his wife and was shot at from a car in a market. On 16 June 2013, he was run down by a car driven and occupied by the same men. Following this incident, the appellant decided to flee Pakistan, and he departed on 2 July 2013. He arrived in Australia a month later and was then transferred to Nauru. On 19 December 2013 he made an application for refugee status determination under the *Refugees Convention Act 2012* (NR).

The Secretary of the Nauru Department of Justice and Border Control refused the application on 17 July 2014. The appellant made an application for merits review of that decision to the Refugee Status Review Tribunal. The Tribunal affirmed the decision of the Secretary that the appellant was not recognised as a refugee and was not owed complementary protection under the Act. While the Tribunal was satisfied that the appellant had a well-founded fear of persecution in his home area, it found that this could be avoided by relocating within Pakistan.

The appellant then appealed to the Supreme Court of Nauru (Khan J). His grounds of appeal were:

1. The Tribunal erred by importing a relocation test in its analysis of the appellant's 'complementary protection assessment' in breach of s 4(2) of the Act.
2. The Tribunal erred by failing to consider all of Nauru's international obligations when it determined whether the appellant could relocate within Pakistan, namely its obligation to give 'primary consideration' to the best interests of the appellant's child.
3. The Tribunal erred by failing to consider an integer of the appellant's relocation objections, namely that if he returned to Pakistan other than to his home town he would 'be compelled to go back to the original area of persecution'.

With respect to the issue of relocation, the Court found that the Tribunal's decision was correct. Khan J noted that the purpose of international obligations and complementary protection is to protect those who are not refugees from harm (a harm which is not one of the five convention reasons). If there is an internal relocation alternative open to the appellant then this is as relevant to the

complementary protection consideration as it was to the refugee status determination.

His Honour endorsed the considerations laid out by Hathaway and Foster in *The Law of Refugee Status* when determining if there is an internal relocation alternative for an applicant:

1. Can the applicant safely, legally and practically access an internal site of protection?
2. Will the applicant enjoy protection from the original risk of being persecuted?
3. Will the site provide protection against any new risks of being persecuted or of any indirect *refoulement*?
4. Will the applicant have access to basic civil, political and socio-economic rights provided by the home country or State?

With respect to the second ground, the respondent submitted that Article 2(1) of the *Convention on the Rights of the Child* ('CRC') limits the protections set out in the CRC to protections with respect to "each child within [Nauru's] jurisdiction". The respondent further submitted that it was accepted that the appellant's child was not within Nauru's territory or that Nauru exercised 'physical power and control' over the child. It therefore followed that there was no international obligation owed by Nauru under the CRC to the appellant's child in Pakistan. Khan J found that there was merit in those submissions, and he further found, in any event, that the Tribunal took the interests of the child into consideration when making the finding of relocation.

In dismissing the third ground of appeal, Khan J noted that the tribunal did not fail to consider the practical realities faced by the appellant. The Tribunal noted that he had the assistance of two brothers in his home area, and that there was no reason why his property could not be sold through an agent. Further, it was noted that the appellant had experience as a small trader, and had written and spoken language skills in Urdu and English. It therefore concluded that it would be reasonable for the appellant to relocate.

The grounds of the appeal are similar to the grounds in the Supreme Court appeal, and include:

- The Supreme Court of Nauru erred by failing to conclude that the Refugee Status Review Tribunal had erred by applying a relocation test to the appellant's claim for complementary protection assessment under s 4(2) of the *Refugees Convention Act* 2012 (NR), where no such test exists at law?

The issue raised by this ground of appeal is also raised in two other appeals, namely *CRI026 v Republic of Nauru* (M131/2017) and *EMP144 v Republic of Nauru* (M151/2017) which are all listed for hearing together.